Supreme Court, U.S.
FILED
02 884 DEC 6 - 2002
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ROBERT W. JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN J. JORDAN, ESQ.
632 Commercial Street, 3RD Fl
San Francisco, CA 94111
Telephone: (415) 433-3476
Fax: (415) 296-8734
Attorney for Petitioner
ROBERT W. JOHNSON

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE NINTH CIRCUIT INCORRECTLY LIMITED THIS COURT'S DECISION IN *KYLLO v. UNITED STATES*, 533 U.S. 27, 121 S.Ct. 2038 (2001) TO A PERSON'S HOME, WHEN THE COURT OF APPEALS REFUSED TO APPLY *KYLLO* TO A WARRANTLESS FLIR SEARCH OF JOHNSON'S BARN?

2. WHETHER THE LOWER COURTS ERRED IN NOT SUPPRESSING EVIDENCE SEIZED PURSUANT TO SEARCH WARRANTS, WHERE THE COURTS FOUND THAT THE POLICE AFFIANT HAD LIED IN HIS APPLICATION FOR THREE SEARCH WARRANTS?

3. WHETHER JOHNSON'S FIRST AND SECOND INDICTMENTS SHOULD HAVE BEEN DISMISSED, WITH PREJUDICE, FOR VIOLATIONS OF THE SPEEDY TRIAL ACT?

4. WHETHER THE DISTRICT COURT ERRED IN IMPOSING A TWO LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE PURSUANT TO U.S.S.G. §3C1.1?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

Introduction 1

Opinions Below 1

Jurisdiction 2

Relevant Constitutional and Statutory Provisions 2

Statement of the Case 3

A. Basis for federal jurisdiction 3

B. Proceedings in the District Court 3

C. The Ninth Circuit Decision 5

Argument 7

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT THIS COURT'S HOLDING IN *KYLLO v. UNITED STATES* APPLIES ONLY TO HOMES, AND NOT TO OTHER LOCATIONS PROTECTED BY THE FOURTH AMENDMENT 7

Page

II. THE POLICE SEARCHES SHOULD HAVE BEEN SUPPRESSED UNDER *FRANKS v. DELAWARE* 14

III. THE DISTRICT COURT ERRED IN NOT DISMISSING THE FIRST AND SECOND INDICTMENTS WITH PREJUDICE, FOR VIOLATIONS OF THE SPEEDY TRIAL ACT 16

IV. THE DISTRICT COURT ERRED IN IMPOSING A TWO LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE 20

Conclusion 22

TABLE OF AUTHORITIES

Page(s)

Cases:

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348 (2000) 5

Barker v. Wingo,
407 U.S. 514 (1972) 16

California v. Ciraolo,
476 U.S. 207, 106 S.Ct. 1809 (1986) 9

Dow Chemical Co. v. United States,
476 U.S. 227, 106 S.Ct. 1819 (1986) 8, 12

Franks v. Delaware,
438 U.S. 154 (1978) 14, 15, 17

Katz v. United States,
389 U.S. 347, 88 S.Ct. 507 (1967) 9

Kyllo v. United States,
533 U.S. 27, 121 S.Ct. 2038 (2001) 5-13

Murray v. United States,
487 U.S. 533 (1988) 13

New York v. Burger,
482 U.S. 691, 107 S.Ct. 2636 (1987) 10

Siebert v. Severino,
256 F.3d 648 (7th Cir. 2001) 10-11

Page(s)

United States v. Dunn,
480 U.S. 294, 107 S.Ct. 1134 (1987) 9

United States v. Dunnigan,
507 U.S. 87 (1993) 20-21

United States v. Elkins,
300 F.3d 638 (6th Cir. 2002) 10

United States v. Ford,
532 F.Supp. 352 (D.C. D.C. 1981) 18

United States v. Hoslett,
998 F.2d 648 (9th Cir. 1993) 17

United States v. Huggins,
299 F.3d 1039 (9th Cir. 2002) 11

United States v. Leon,
468 U.S. 897, 104 S.Ct. 3405 (1984) 11

United States v. Lloyd,
125 F.2d 1263 (9th Cir. 1997) 20

United States v. Marion,
404 U.S. 307, 92 S.Ct. 455 (1971) 18

United States v. Monzon-Valenzuela,
186 F.3d 1181 (9th Cir. 1999) 20

United States v. Perez,
845 F.2d 100 (5th Cir.),
cert. denied, 488 U.S. 847 (1988) 18

Page(s)

United States v. Ramirez-Cortez,
213 F.3d 1149 (9th Cir. 2000) 19

United States v. Robinson,
63 F.3d 889 (9th Cir. 1995) 20

United States v. Rubio,
727 F.2d 786 (9th Cir. 1983) 15

United States v. Runyan,
275 F.3d 449 (5th Cir. 2001) 10

Statutes and Rules:

U.S. Const. Amend. IV 2, 7-9

U.S. Const. Amend. VI 2

18 U.S.C. § 3161 16

18 U.S.C. § 3161(b) 17

18 U.S.C. § 3161(d)(1) 18

18 U.S.C. § 3161(h)(1)(J) 17, 18

18 U.S.C. § 3161(h)(8)(A) 19

18 U.S.C. § 3161(h)(8)(B)(ii) 17

18 U.S.C. § 3231 2

21 U.S.C. § 841(a)(1) 4

Page(s)

21 U.S.C. § 846 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 3

U.S.S.G. § 3C1.1 ..... 2, 6, 20

Supreme Court Rule 10(a) 7

Supreme Court Rule 10(c) 7, 16

Supreme Court Rule 13.1 2

Supreme Court Rule 13.3 2

IN THE

Supreme Court of the United States

ROBERT W. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert W. Johnson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming Johnson's conviction and sentence.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit affirming Johnson's conviction and sentence, *United States v. Johnson*, No. 00-10424 (9th Cir. August 5, 2002) appears at Petitioner's Appendix ("App.") A. The September 18, 2002 order of the Ninth Circuit denying rehearing and denying rehearing en banc is unreported. App. B.

STATEMENT OF THIS COURT'S JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is filed within 90 days of the entry of final judgment by the Court of Appeals (i.e., the Court of

Appeals' decision denying Johnson's petition for rehearing, filed on September 28, 2002) and is therefore timely under 13.1 and 13.3 of the Rules of the Supreme Court of the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

Section 3C1.1 of the U.S.S.G. provides: "If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of a ... prosecution, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct ... increase the offense levels by 2 levels."

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

The United States District Court had jurisdiction over this Federal criminal case pursuant to 18 U.S.C. § 3231. The

Court of Appeals for the Ninth Circuit had jurisdiction over the appeal from the final judgment and criminal conviction pursuant to 28 U.S.C. § 1291.

B. Proceedings in the United States District Court

Petitioner Robert W. Johnson (hereafter Johnson) and co-defendant Joel Muranaka[1] were originally arrested on May 31, 1995 on California state charges, after Federal and California law enforcement officials executed California state search warrants at a barn located on a rural parcel at Summit Road in Santa Clara County; Johnson's residence at 239 Francis Dr., Los Altos; and co-defendant Muranaka's residence at 185 Hemlock Court, Palo Alto. Marijuana plants were found at the barn, and other evidence was seized from the two residences.

As part of their investigation leading up to the decision to seek search warrants for the Summit Road property and Johnson's and Muranaka's residences, California law enforcement agents conducted two warrantless aerial reconnaissances of the Summit Road property, one of which was a "Forward Looking Infra Red" ("FLIR") mission over the Summit Road property on May 18, 1995, using a highly sophisticated and intrusive military-like FLIR device.

The state charges were never pursued, and on October 19, 1995, a federal grand jury returned the first indictment, CR-95-20119-RMW, charging Johnson and Muranaka with conspiracy to manufacture and distribute marijuana, in violation of 21 U.S.C. § 846 (count one), and manufacture and possession with intent to distribute marijuana, in violation of 21

---

[1] Muranaka has filed a separate petition for certiorari, which this Court denied in *Muranaka v. United States*, No. 02-6401 (October 21, 2002).

U.S.C. § 841(a)(1) (count two). Muranaka was also indicted on money laundering charges.

Prior to trial, Johnson filed a motion to suppress the evidence seized pursuant to the search warrants, based in part on the improper FLIR flight and the law enforcement affiant's misrepresentations in the affidavit submitted in support of the search warrants. The trial court denied the motions to suppress. App. A at 3a.

Johnson also filed a motion to dismiss the indictment, with prejudice, for violation of the Speedy Trial Act, when the government did not indict him for more than 120 days after his arrest, and when the court took more than 5 months to decide the *Franks* motion. The court denied Johnson's Speedy Trial motion to dismiss with prejudice, but did dismiss the indictment without prejudice. App. A at 6a.

The government retained the evidence seized after the indictment was dismissed.

The government reindicted the case on September 15, 1998. Johnson then proceeded to trial on March 31, 1999. Trial concluded on April 28, 1999, with a hung jury as to Johnson. Muranaka was convicted on one count, which was later set aside by the court prior to the re-trial.

Prior to the retrial, Johnson filed a motion for the trial court to re-consider its order denying the motion to suppress. The trial court denied the motion. App. A at 3a.

On May 10, 1999, the district court granted a 4-month delay in starting the retrial, setting a September 13, 1999 trial date. App. A at 6a.

Johnson also filed a motion to dismiss the indictment for violations of the Speedy Trial act, which the district court denied. App. A at 4a.

On September 20, 1999, the second trial began. On November 9, 1999, the trial concluded with convictions of both Johnson and Muranaka of conspiracy to manufacture and distribute, and possession with intent to distribute marijuana.

On September 13, 2000, the district court sentenced Johnson to 71 months in prison.

C. The Ninth Circuit Decision

Johnson timely appealed his conviction and sentence to the United States Court of Appeals for the Ninth Circuit. On appeal, Johnson raised eight issues which denied him a fair trial.

In addition to the four points raised here, Johnson was not afforded a fair jury, as post-arrest statements by him were improperly admitted; he was not properly advised by the trial court that he faced strict time limits at trial when he waived representation and proceeded pro-se; and he was improperly tried under an open-ended indictment and then sentenced in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

The Ninth Circuit affirmed Johnson's conviction and sentence in *United States v. Johnson*, No. 00-10424 (9th Cir. August 5, 2002) (unpublished). App. A.

In its opinion, the Ninth Circuit ruled that this Court's holding in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038

(2001), requiring a warrant for a FLIR overflight, was inapplicable, because it believed the holding was limited to a person's home. App. A at 3a.

The court also held that the district court did not err in finding that probable cause existed to support the search warrants, not withstanding the fact that the court found troubling the agent's misrepresentations in the affidavit submitted in support of the search warrants. App. A at 2a.

The court found that Johnson's speedy trial rights were not violated. App. A at 4a-7a.

The court also found that there was a sufficient basis for imposing the obstruction of justice enhancement against Johnson, pursuant to U.S.S.G. 3C1.1.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED IN HOLDING THAT THIS COURT'S HOLDING IN *KYLLO v. UNITED STATES* APPLIES ONLY TO HOMES, AND NOT TO OTHER LOCATIONS PROTECTED BY THE FOURTH AMENDMENT

The Ninth Circuit's decision in this case that this Court's holding in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001), applies only to a person's home is an important question of federal law that has not been, but should be decided by this Court. In addition, the decision of the Ninth Circuit is contrary to decisions of other United States Courts of Appeals.

For these reasons, granting this petition is appropriate. See rules 10(a) & (c) of the Rules of the Supreme Court of the United States.

Johnson's Fourth Amendment right against unreasonable searches was violated when law enforcement agents conducted a warrantless "FLIR" over the barn at the Summit Road property, utilizing a highly intrusive and sophisticated FLIR device.

The law enforcement agents decided to obtain search warrants only after receiving and reviewing information obtained in the FLIR flight over the barn, and included information regarding the FLIR flight in the case agent's affidavit in support of the search warrants. The agents then executed the warrants, and seized marijuana inside the barn at the Summit Road property and other evidence at Johnson's

residence.

Johnson specifically objected to the FLIR flight as an illegal search in his original motion to suppress evidence, but the lower courts refused to suppress the evidence subsequently seized. App. A at 3a. The district court deliberately avoided ruling on the "FLIR" motion, stating that it would not reach the issue unless it first found there was no other probable cause in the affidavit in support of the search warrants.

Since the district court's rulings, this Court issued its ruling requiring a warrant for a "FLIR" overflight. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001).

Johnson raised this issue on appeal, arguing that the district court erred by not reaching the impact of the warrantless FLIR overflight on the decision of the agents to obtain search warrants.

In response to Johnson's argument on appeal, the Ninth Circuit flatly ruled that *Kyllo* "applies only to a home." App. A at 3a. Citing *Dow Chemical Co. v. United States*, 476 U.S. 227, 239, 106 S.Ct. 1819, 1827 (1986), the court held that the warrantless FLIR overflight was thus not an illegal warrantless search of the barn at Summit Road.

The Ninth Circuit's decision here is an unwarranted limitation of this Court's holding in *Kyllo* solely to a home, and wrongly draws a bright line exclusion to any other property.

First, although this Court in *Kyllo* was reviewing a FLIR overflight of a person's home, and detailed the long-standing protection against warrantless searches of a home, this Court also made clear that the Fourth Amendment protects

searches of areas outside the home "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32-33, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) and *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809 (1986).

In *Katz*, which involved eavesdropping of conversations in a telephone booth, a location not specifically cataloged by the Fourth Amendment ("persons, houses, papers, and effects"), this Court held that "the Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth." *Kyllo*, 533 U.S. at 32-33, citing *Katz*, 389 U.S. at 353.

Thus, while *Kyllo* did recognize that the Fourth Amendment required a warrant for a FLIR overflight of a home, it did not rule out that similar Fourth Amendment protection might apply to other structures, such as a barn when there is a subjective expectation of privacy that society recognizes as reasonable in those structures.

The Ninth Circuit had no basis for flatly ruling that a barn could never be protected by the Fourth Amendment. This Court has not flatly rejected that a barn always lacks Fourth Amendment protection. To the contrary, this Court, in *United States v. Dunn*, 480 U.S. 294, 303, 107 S.Ct. 1134 (1987), accepted "for the sake of argument, respondent's submission that his barn enjoyed Fourth Amendment protection and could not be entered and its contents seized without a warrant."

In addition, the decision by the Ninth Circuit here to flatly reject Fourth Amendment protection for a barn is at odds with other circuit cases.

The Sixth Circuit has recognized that there is a need for guidance on this question of the extent of the protection afforded by *Kyllo*. In *United States v. Elkins*, 300 F.3d 638 (6th Cir. 2002), the court stated: "While *Kyllo* broadly protects homes against warrantless thermal imaging, the case before us involves the use of a thermal imager to scan the Elkinses' commercial buildings. There is a reasonable expectation of privacy in business premises, yet it is less than the reasonable expectation of privacy enjoyed by the home." *Id.*, at 646, citing *New York v. Burger*, 482 U.S. 691, 699-700, 107 S.Ct. 2636 (1987). Acknowledging that there is "little federal precedent on the thermal imaging of commercial property, and none since *Kyllo*," the court declined to reach the issue, stating that courts should avoid unnecessary constitutional questions, then going on to find that the thermal imaging evidence was immaterial to the ultimate issues in the case and need not be addressed. *Id.*, at 646-47.

In *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), the Fifth Circuit concluded that the defendant there had a reasonable expectation of privacy in items stored in a barn. *Id.*, at 458 ("Runyan's efforts to secure the barn against intrusion by locking the barn door, putting a chain on the gate to the ranch, and installing video surveillance equipment at the ranch certainly qualify as normal precautions to maintain privacy.").

And, the Seventh Circuit, in a section 1983 civil suit case, held that the plaintiffs had a reasonable expectation of privacy in their barn, even though it was 60 feet from their home, and outside the curtilage of the home, such that the barn was protected by the Fourth Amendment. *Siebert v. Severino*, 256 F.3d 648, 654 (7th Cir. 2001) ("Thus, the question presented on appeal is whether the Sieberts had a reasonable

expectation of privacy in their barn. They did. The barn was within 60 feet of their home. It had doors on it, which they often kept locked, and it was located in a fenced-in area of their property.").

In fact, in another Ninth Circuit case, *United States v. Huggins*, 299 F.3d 1039 (9th Cir. 2002), a different panel of judges used a different rationale when the panel reviewed the validity of a search warrant issued based on information received from a FLIR overflight of two barns. *Id.*, at 1042. But, in *Huggins*, the FLIR flights were conducted pursuant to a warrant, albeit a warrant lacking in probable cause. *Id.*, at 1041-42.

Unlike this case, the *Huggins* court did not flatly rule that *Kyllo* did not apply to barns, and thus the fact that the FLIR warrants lacked sufficient probable cause was immaterial because no warrant was actually needed. Instead, the court assumed that this Court's decision in *Kyllo* required a warrant for the FLIR overflight, and went on to rule that the "good faith exception" applied to the FLIR warrant, and suppression was unwarranted. *Id.*, at 1044-46, citing *United States v. Leon*, 468 U.S. 897, 922, 104 S.Ct. 3405 (1984) (further citations omitted).

The Ninth Circuit's decision in this case wrongly focused on whether the barn was home-like, rather than whether the barn was used for personal activities and whether Johnson attempted to maintain his privacy at the barn, such that he had a subjective expectation of privacy in the barn that society recognizes as reasonable.

And, there was evidence in the record below to support Johnson's contention that he made personal use of the barn and

protected his privacy while within the barn.

The barn itself was locked, windowless, roofed, and well insulated for privacy. This was apparent to the officers engaged in the aerial surveillance of the barn.

Further, there was testimony that Johnson bought the property for an investment, and as a possible site for a home. Further, there was testimony that Johnson's sister and mother had visited him and his girlfriend at the Summit Road property for family gatherings on July 4, 1993 and July 4, 1994. There was further testimony that Johnson's girlfriend had made other personal visits to the Summit Road property in December, 1992, and May, 1994.

Moreover, the Ninth Circuit's reliance on *Dow Chemical Co. v. United States*, 476 U.S. 227, 239, 106 S.Ct. 1819, 1827 (1986), is misplaced. *Dow Chemical* does not hold that the Fourth Amendment prohibition against illegal searches never applies outside the home. Rather, as this Court stated in *Kyllo*, "*Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home." *Kyllo*, 533 U.S. at 37. Here, in contrast, the agents performed a FLIR overflight, a far more intrusive search than was done in *Dow Chemical*. And, here, the agents searched a much more private area than in *Dow Chemical*, a privately owned barn that was being used for private activities.

In avoiding the application of *Kyllo*, the Ninth Circuit erred in failing to rule on whether the illegal "FLIR" flight tainted law enforcement's decision to subsequently obtain the three warrants. This Court has squarely recognized that to be untainted by a prior search, the officers' decision to seek the

warrant must not have been "prompted by what they had seen during [the earlier unlawful search]." *Murray v. United States*, 487 U.S. 533, 542 (1988).

Thus, this case squarely presents this Court with the issue of whether its holding in *Kyllo* is limited to FLIR searches of homes, or whether it also applies to other locations previously recognized as protected by the Fourth Amendment. In addition, the sophisticated FLIR device used here presents this Court with the issue of the increasingly intrusive devices being used by law enforcement officials to invade private areas.

II.

THE POLICE SEARCHES SHOULD HAVE BEEN SUPPRESSED UNDER *FRANKS v. DELAWARE*

The Ninth Circuit also erred in upholding the searches at the barn on Summit Road and the residences of Johnson and Muranaka, in the face of the misrepresentation in the application for the warrant by the case agent. The searches should have been suppressed under *Franks v. Delaware*, 438 U.S. 154 (1978). The affirmance below, based on the district court's re-writing of the search warrant affidavit, is an unwarranted extension of the procedure to be followed under *Franks*.

Johnson attacked below the search warrants, contending that the police officer affiant had made material false statements regarding smelling marijuana at Summit Road in order to obtain the warrants.

The *Franks* hearing bore out Johnson's assertions, as the police officer affiant had to admit that the facts he stated in his affidavit as to where he was when he claimed to have smelled marijuana at Summit Road were not correct. In the district court's written decision of Johnson's motion to suppress, the court found that the agent's affidavit "as to where he was when he smelled marijuana was "misleading and "probably intentionally so."" App. A at 2a.

But, the court went on to uphold the warrants by "striking" only part of the officer's lie. The court decided the officer was lying about where and when he smelled marijuana, but not about whether he smelled marijuana. App. A at 2a-3a.

The Ninth Circuit upheld the denial of the suppression motion. App. A at 2a. Although the court was troubled by the agent's misrepresentations, it held that the district court's finding that the agent did smell marijuana was not clearly erroneous.

There is no support in the record (or in the affidavit), however, for the district court to decide where to place the officer, and then hold that the officer smelled marijuana from this hypothetical place. After the misrepresentation is stricken, there is no indication in the affidavit as to where the officer was when he supposedly smelled the marijuana. Without a specified location, there is no basis for concluding that even if the officer smelled marijuana, the smell was coming from the barn.

The Ninth Circuit ignored one of the key and long-standing rules of Fourth Amendment law: "The facts upon which the magistrate bases his probable cause determination must appear within the four corners of the warrant affidavit; the warrant cannot be supported by outside information." *United States v. Rubio*, 727 F.2d 786, 795 (9th Cir. 1983).

The courts below, under *Franks*, should have stricken the lie, and then re-examined the warrant for probable cause, without adding new facts. This case thus squarely presents the issue of the proper application of *Franks*.

III.

JOHNSON'S RIGHTS UNDER THE SPEEDY TRIAL ACT WERE VIOLATED

Johnson clearly did not receive a speedy trial, and the public's interest in a speedy trial was not protected in this case.

Johnson was originally arrested on May 31, 1995, on a comparatively simple marijuana "grow" case involving three searches done in a single day. There were only two defendants. The case was so simple, it was originally taken to state court. Yet, Johnson was not finally tried on this case to verdict until November 9, 1999, almost four and a half years later.

This Court has noted that inordinate delay between public charge and trial "wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty . . . and create anxiety in him, his family, and his friends." *Barker v. Wingo*, 407 U.S. 514, 537 (1972) (citations and internal quotations omitted).

The extraordinary delay in this case was for a simple marijuana case involving three searches conducted on the same day. This should never have been ruled a complex case, and the excessive delay was not justified under the Speedy Trial Act, 18 U.S.C. § 3161 et seq.

This case thus presents this Court with several issues dealing with the proper application of the Speedy Trial Act, raising important issues of federal law. See Rule 10(c) of the Rules of the Supreme Court.

First, the decision of the trial court to characterize this

simple marijuana case as complex, within the meaning of 18 U.S.C. § 3161(h)(8)(B)(ii), is a clear misapplication of the statute. Under no view of the facts can this case be seen as a complex case, calling for large delays in bringing the case to trial.

Second, Johnson was originally arrested on May 31, 1995 on state charges, by Federal and California law enforcement officials. This arrest should have triggered the Federal Speedy Trial clock, because it was intended from the start that Johnson would be prosecuted federally. Thus, the indictment should have been brought within 30 days of Johnson's original arrest on May 31, 1995 under 18 U.S.C. § 3161(b). As the government took 140 days to indict, the courts below incorrectly failed to find this was a violation of § 3161(b).

Third, Johnson's right to a speedy trial was violated when the district court took more than 30 days to decide the *Franks* motion. 18 U.S.C. § 3161(h)(1)(J). Although the district court did dismiss the first indictment for this violation, it did so on the government's motion to dismiss without prejudice, and did not grant Johnson's motion to dismiss with prejudice. The net result was that Johnson received an even later trial by bringing his first speedy trial motion, in clear violation of the aim of the Speedy Trial Act.

Fourth, as the original indictment was dismissed on the government's motion to dismiss without prejudice, as opposed to Johnson's motion to dismiss with prejudice, the district court erred in not deeming the 70-day clock for the new indictment to commence from the date of the original indictment. See *United States v. Hoslett*, 998 F.2d 648, 658 (9th Cir. 1993).

Fifth, the government improperly took more than 30 days to re-indict Johnson after the first indictment was dismissed for the 3161(h)(1)(J) violation, by not filing the new indictment until September 15, 1998, in violation of 18 U.S.C. §3161(d)(1). As the new indictment was for the same offenses, and as Johnson and his seized property remained under the jurisdiction of the district court in between the dismissal of the first indictment and his re-indictment, the Ninth Circuit court erred in not finding that the 30 day clock under §3161(d)(1) re-started on the day the first indictment was dismissed. See *United States v. Perez*, 845 F.2d 100, 104 (5th Cir.), *cert. denied*, 488 U.S. 847 (1988), *United States v. Ford*, 532 F.Supp. 352 (D.C. D.C. 1981).

The Ninth Circuit's reliance on *United States v. Marion*, 404 U.S. 307, 321, 92 S.Ct. 455 (1971), in denying Johnson's appeal on this point is misplaced, because *Marion* dealt with a situation where the defendant was never arrested. *Id.* Here, Johnson was arrested before the first indictment, and his property seized. The fact that he was not formally re-arrested after the dismissal of the first indictment does not negate the fact that he was originally arrested, and does not negate the fact that his property remained seized during the time period between the two indictments. Because the government took more than 30 days to re-indict Johnson after the dismissal of the first indictment, there was a second violation of §3161(d)(1).

Sixth, the first trial did not take place until March 31, 1999, more than 180 days after the re-indictment filed on September 15, 1998. When that trial ended in a hung verdict on April 28, 1999, the second trial, essentially a repeat of the first trial, still did not begin for another 120 days, on September 20, 1999.

The key continuance at issue here was the four month continuance granted by the district court on May 10, 1999, because the prosecutor was going on vacation and Johnson's counsel had other cases with trial dates and was planning on taking a vacation in August. App. A at 6a-7a. The Ninth Circuit's decision that these reasons were a proper basis for excluding time under 18 U.S.C. § 3161(h)(8)(A) is not correct.

Indeed, the Ninth Circuit decision in this case is at odds with its own precedents rejecting exclusion of time under the speedy trial act for attorney conveniences. See, e.g. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000); *United States v. Lloyd*, 125 F.2d 1263 (9th Cir. 1997).

In sum, this simple marijuana case, based on one day of searches, was not so complex as to allow for four years of delay. Johnson's right to a speedy trial, and the public's interest in a speedy trial, were ignored in this case. This case thus presents this Court with the opportunity to explain and amplify the proper exclusions of time under the Speedy Trial Act.

IV.

THE NINTH CIRCUIT ERRED IN UPHOLDING THE IMPOSITION OF A TWO LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE

The Ninth Circuit erred in upholding the district court's decision at sentencing to enhance Johnson's guidelines score by two levels for obstructing justice, pursuant to U.S.S.G. §3C1.1.

Johnson objected to this sentencing enhancement, but the trial court failed to independently find that Johnson had perjured himself at trial.

Once Johnson objected to this recommended sentence enhancement, the district court was required to review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition set out by this Court. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

In order to find perjury, the district court must find that the defendant's testimony was (1) false, (2) material, and (3) willful. *Id.* at 94; accord *United States v. Robinson*, 63 F.3d 889, 891-92 (9th Cir. 1995).

It is true that Johnson testified and was later convicted. But, an enhancement for obstruction of justice is not justified just because a defendant chose to testify and was convicted. "Imposing the enhancement without a judicial finding of perjury might unduly burden the defendant's Constitutional right to testify." *United States v. Monzon-Valenzuela*, 186 F.3d 1181, 1183 (9th Cir. 1999), citing *United States v. Dunnigan*, 507 U.S. at 96-97.

At sentencing, the district court did not make the necessary special findings as to whether Johnson's testimony was false, material, and willful. Instead, it simply stated that it did not find the defense believable. This finding was not sufficient under *Dunnigan*.

In response to Johnson's argument on appeal, the Ninth Circuit ruled that the district court did make the required findings. App. A at 11a. But, the court's decision focused on the district court's findings as to both defendants' actions below, rather than focusing on Johnson's individual actions and testimony. *Dunnigan* requires that the district court focus on Johnson's own behavior at trial, and not base a finding of obstruction based on another defendant's actions.

Accordingly, the decision of the Ninth Circuit is contrary to this Court's holding in *Dunnigan*, and should be reversed.

CONCLUSION

For the foregoing reasons stated, this Court should grant certiorari.

Dated: December 10, 2002

Respectfully submitted,

JOHN J. JORDAN
Counsel for Petitioner
ROBERT W. JOHNSON

INDEX

Appendix A:

Opinion of the United States Court of Appeals for the Ninth Circuit filed August 5, 2002 ..... 1a

Appendix B:

Order of the United States Court of Appeals for the Ninth Circuit denying rehearing filed September 18, 2002 ..... 12a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10424, No. 00-10458

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ROBERT W. JOHNSON,
Defendant - Appellant.

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

JOEL Y. MURANAKA,
Defendant - Appellant.

---

42 Fed. App.. 959; 2002 U.S. App. LEXIS 16325

July 10, 2002, Argued and Submitted,
San Francisco, California

August 5, 2002, Filed

OPINION:

MEMORANDUM*

Before: CANBY and RYMER, Circuit Judges, and BERTELSMAN,** Senior District Judge.

Robert W. Johnson and Joel Y. Muranaka appeal their convictions and sentences for conspiracy and drug-related charges. We have jurisdiction under 28 U.S.C. sect. 1291, and we affirm on all issues.

I. Motion to Suppress

A. Mecir's affidavit

Both defendants argue that the district court erred in upholding the searches of their property given that the affidavit used to obtain the search warrant contained misrepresentations by officer Robert Mecir (Mecir) of the Santa Clara County Sheriff's Department. After a two-day hearing, the district court held that Mecir's statements as to where he was when he smelled marijuana were "misleading and probably intentionally so." Nonetheless, the district court only struck the part of the affidavit concerning where and when Mecir smelled marijuana, not the portion regarding whether he smelled marijuana.

We review credibility determinations made by the district court at a suppression hearing under a clearly erroneous standard. *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993). While we find Mecir's misrepresentations troubling, we cannot say under a clearly erroneous standard the district

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

court's finding that Mecir smelled the odor of marijuana is in error. Simply because the district court did not believe portions of Mecir's testimony, does not dictate that it had to discredit all of his testimony. *See Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Services Co.*, 206 F.3d 900, 912 (9th Cir.), *cert. denied*, 531 U.S. 919, 148 L. Ed. 2d 203, 121 S. Ct. 283(2000) (citation omitted). Accordingly, we find that the district court did not err in holding that probable cause existed to support the search warrant affidavit.

B. The overflight

The defendants also contend that the district court erred in denying the motion to suppress because officers conducted a warrantless thermal imaging search of the barn during an overflight of the property. Defendants rely on *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) for their argument. However, *Kyllo* applies only to a home. In the present matter, the district court held that the barn was not a home for either defendant. The evidence upon which the district court relied included that the structure was barn-like; neither defendant lived in the barn; and no items normally associated with residential living were located at the property. Based upon a review of this evidence, we hold that the district court's finding that the structure was not a home was not clearly erroneous. Therefore, the overflight was not an illegal warrantless search of the property. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 239, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226 (1986).

C. The nexus between the barn and the residences

The defendants also contend that the affidavit did not establish a sufficient nexus with the barn to justify the search of their homes. There need be "only a reasonable nexus between the activities supporting probable cause and the locations to be searched." *United States v. Pitts*, 6 F.3d 1366,

1369 (9th Cir. 1993) (citation omitted). "In the case of drug dealers, evidence is likely to be found where the dealers live." *Id.* (citations omitted).

Given the evidence of the large scale marijuana growing operation; the joint ownership of the Summit Road property; and the trips to and from the defendants' residences to the Summit Road property, the district court did not err in holding an adequate nexus existed between the barn and the residences to support probable cause to search the defendants' homes.

D. Rule 41(d)

Defendant Johnson also claims that the district court erred in denying his motion to suppress based on his allegations that the officers failed to leave copies of the warrants or property receipts pursuant to Federal Rule of Criminal Procedure 41(d). Although there is testimony in the record that the officers did comply with Rule 41(d), we find that even without this testimony, there was no error on the part of the district court in denying Johnson's motion to suppress. The violations claimed by Johnson were merely technical violations and did not require suppression. *See e.g., United States v. Motz*, 936 F.2d 1021, 1025 (9th Cir. 1991).

II. Speedy Trial Act

A. First indictment

Defendants moved the district court to dismiss the first indictment for violations of the Speedy Trial Act, 18 U.S.C. sect. 3162(a)(2). After a hearing on the matter, the district court dismissed the first indictment without prejudice. Defendants contend it was error for the district court to dismiss the indictment without prejudice. We review the district court's application of the Speedy Trial Act *de novo*, and its factual findings for clear error. *United States v. Messer*, 197 F.3d 330, 336 (9th Cir. 1999) (citations omitted). The district court's

decision to dismiss without prejudice is reviewed for abuse of discretion. *United States v. White*, 864 F.2d 660, 661 (9th Cir. 1988).

To determine whether to dismiss the indictment with or without prejudice, the district court must consider three factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case which led to the dismissal; and (3) the impact of a reprosecution on the administration of the Act and on the administration of justice. *United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir.), *cert. denied*, 514 U.S. 1122, 131 L. Ed. 2d 876, 115 S. Ct. 1990(1995) (citing 18 U.S.C. sect. 3162(a)(1)). The district court also must conduct a hearing on notice, make factual findings and apply these three factors. *Id.* (citing *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988)).

After a hearing on the matter, the district court made factual findings on the above factors. The court found that the offenses with which the defendants were charged were serious in light of the number of narcotics-related offenses and the sizable amount of marijuana at issue.

The court also found that a number of other facts leading to the dismissal weighed in favor of dismissing without prejudice. These facts included that the defendants were not incarcerated during the pretrial period and that their liberty was not significantly restricted during the delay; there was no significant showing of prejudice or inability to prepare for trial due to the delay; and that the delay was due in part to the defendants' requests for continuances.

As to the final factor, the impact of reprosecution, the district court found that reprosecution would not offend the administration of justice nor the administration of the Speedy Trial Act. Accordingly, the district court dismissed the indictment without prejudice.

In reviewing these factors, we conclude that the first indictment was correctly dismissed without prejudice. Further, we find that there was no showing by defendants of a ruse by the United States intended to bypass the Speedy Trial Act. Therefore, we affirm the district court's holding as to the first indictment.

B. Second indictment

Defendants also contend that the district court erred in not dismissing the second indictment where the trial did not commence within seventy days from the date triggered by the first indictment. We review the sufficiency of an indictment under a de novo standard, *United States v. Musacchio*, 968 F.2d 782, 787 (9th Cir. 1991) (citation omitted), and we agree with the district court. Where an indictment is dismissed on the defendants' motion, the return of a subsequent indictment triggers a new seventy-day period under the Speedy Trial Act. *United States v. Magana-Olvera*, 917 F.2d 401, 404 (9th Cir. 1990) (citations omitted).

Defendants also argue that the district court erred in not dismissing the second indictment because the government took more than thirty days for the second indictment. However, because defendants were indicted without an arrest, the thirty-day time period under 18 U.S.C. sect. 3161(b) was not violated. *See e.g. United States v. Marion*, 404 U.S. 307, 321, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978).

Defendants' final argument under the Speedy Trial Act is that the seventy-day period under 18 U.S.C. sect. 3161(c)(1) was violated when the district court granted a four-month continuance. At a hearing held on May 10, 1999, the district court questioned the attorneys regarding their schedules for a trial date. While the prosecuting attorney was prepared to try the case in late June, Johnson's attorney stated that he could not

do so. Based on the attorneys' scheduling conflicts, the district court found that a September date would work for everyone and the ends of justice were served by the delay outweighing the best interest of the public and the defendants in a speedy trial. The court based this finding on the agreement of the parties concerning the need to ensure continuity of counsel within the meaning of 18 U.S.C. sect. 3161(h)(8)(iv).

This court has held that in order to comply with the Speedy Trial Act, the district court must satisfy two requirements whenever it grants an "ends of justice" continuance: "(1) the continuance must be 'specifically limited in time'; and (2) it must be 'justified [on the record] with reference to the facts as of the time the delay is ordered.'" *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) (citing *United States v. Jordan*, 915 F.2d 563, 565-66 (9th Cir. 1990); *accord United States v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994); *United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984)). We find that the district court complied with these requirements given the counsels' unavailability. Hence, the delay was properly excluded.

III. Johnson's Post-Arrest Statements

Defendant Johnson argues that the district court erred in failing to suppress his post-arrest statements. He maintains that despite his asking to speak with an attorney, he was questioned without one present. Thus, he argues that his Fifth Amendment rights were violated after he invoked his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 Ohio Misc. 9, 36 Ohio Op. 2d 237 (1966).

The district court held a hearing on Johnson's motion to suppress. Three officers testified at the hearing in direct conflict with the facts alleged in Johnson's declaration concerning his questioning, request of an attorney and whether he was given a proper Miranda warning. Hence, the district court was faced

with a credibility issue, which this court reviews for clear error. *United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001) (citations omitted).

The three officers testified and were subject to cross-examination, while Johnson's declaration was not likewise subject to cross-examination. Upon consideration of the testimony given at the hearing, the district court credited the officers' testimony. After reviewing the record, we cannot say that this credibility finding was in error. Accordingly, the district court did not err in admitting Johnson's post-arrest statements.

IV. Johnson's Sixth Amendment Claims

Johnson complains that his Sixth Amendment right to counsel was violated when he was not warned of time restrictions at the trial at the time he requested to represent himself at his trial. The court finds no merit in this argument.

Pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), Johnson had a constitutional right to represent himself where his decision was "made with eyes open." The district court in this matter strongly advised Johnson against representing himself and questioned him extensively regarding the standards that would be required of Johnson if he did represent himself. It was during the hearing in which Johnson requested self representation that the district court set time limits in this matter. Johnson was fully aware that he would be subjected to the time limits, the same as the other attorneys in the matter. Nonetheless, he continued to represent himself once he was aware of the time limits. Given the admonitions the district court gave and the detailed questioning to ensure that Johnson was aware of the requirements he would have to meet in representing himself, we find that his Sixth Amendment right to counsel was not violated.

V. The Open-Ended Indictment

Johnson attacked the validity of his indictment arguing that it was improperly open-ended as to the time span in the indictment. He objected to the indictment in an in limine motion, which the district court denied. The district court also barred Johnson from arguing at trial that the government was introducing evidence of acts beyond the applicable statute of limitations for the conspiracy.

The use of open-ended dates in a conspiracy case is not defective where the indictment provides a narrowing focus. *United States v. Laykin*, 886 F.2d 1534, 1542 (9th Cir. 1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 267, 110 S. Ct. 2586 (1990). In the present case, the indictment was narrowed by a fixed date at one end and by the allegation of the overt acts with which Johnson was charged. Therefore, the indictment contained sufficient information for Johnson to have prepared an adequate defense.

Furthermore, Johnson's argument regarding the government's presentation of evidence outside the statute of limitations has no merit. "The statute of limitations does not bar the introduction of evidence of acts that occurred outside the limitations period." *Musacchio*, 968 F.2d at 790 (note omitted).

VI. Juror Error

Defendant Johnson argues that the trial court erred in denying his challenge for cause of a juror who he alleges was biased against him because of his choice of self representation. We review a district court's findings regarding actual juror bias for manifest error or abuse of discretion. *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (citation omitted).

Upon the district court's questioning the juror regarding bias, the juror replied that to the best of her ability, she would not be influenced by Johnson's self representation and would not hold it against him. In light of the district court's detailed questioning of the juror on bias and her responses thereto, we find that the district court did not abuse its discretion in finding that the juror was not biased.

VII. Apprendi Issue

In *Apprendi v. New Jersey*, 530 U.S. 466, 1205 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the Court held that any factor which increased the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The defendants in the present case were sentenced prior to the *Apprendi* decision and hence, the jury was not instructed that it had to determine any particular amount of marijuana in order to convict the defendants. The defendants presently argue that because there has been no finding by a jury on the amount of marijuana, the district court was required under *Apprendi* to impose the minimum statutory penalty range of zero to five years pursuant to 21 U.S.C. sect. 841(b)(1)(D). The United States concedes there was error under *Apprendi*. Nonetheless, it argues the error was harmless because the sentence would not have been different even if the district court had complied with *Apprendi*. We review defendants' sentence on this issue for harmless error beyond a reasonable doubt. *United States v. Smith*, 282 F.3d 758, 771 (9th Cir. 2002) (citations omitted).

The evidence at trial in the present case was that nearly 1000 marijuana plants were discovered at the Summit Road property. Given the number of plants seized, we find that pursuant to *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002) (en banc), the *Apprendi* error was harmless. We so hold because on the basis of the evidence at trial, no rational juror

could have found the defendants guilty of possessing fewer than 100 marijuana plants, the minimum number necessary to trigger the statutory maximum under 21 U.S.C. sect. 841 (b)(1)(B)(vii). Therefore, the *Apprendi* error was harmless.

VIII. Obstruction of Justice Enhancement

The defendants argue that the district court erred in imposing a two-level enhancement to the defendants' guideline score for obstruction of justice under U.S.S.G. sect. 3C1.1 because the district court failed to make sufficient findings to support the enhancement. We review the factual findings in support of an obstruction of justice sentencing enhancement for clear error and application of the enhancement to those facts for an abuse of discretion. *United States v. Garcia-Guizar*, 160 F.3d 511, 524 (9th Cir. 1998), *amended by* 234 F.3d 483 (2000), *cert. denied*, 532 U.S. 984, 149 L. Ed. 2d 490, 121 S. Ct. 1629 (2001).

Upon a review of the record, we hold that the district court's findings are sufficient to support the enhancement and that the district court adequately explained the basis for the enhancement. This explanation included specific findings on defendants' testimony regarding defendants' knowledge about the location of marijuana and their explanations about rent money and documentation. This testimony was material to the charges. We find this explanation adequate, and accordingly we find no error.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10424

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ROBERT W. JOHNSON,
Defendant - Appellant.

D.C. No. CR-98-20092-RWJ
Northern District of California, San Jose

Filed Sept. 18, 2002
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: CANBY and RYMER, Circuit Judges, and BERTELSMAN,** Senior District Judge.

The panel has voted to deny the petition for rehearing. Judge Rymer voted to deny the petition for rehearing en banc and Judges Canby and Bertelsman so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed.R.App.P. 35.

** Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

The petition for rehearing and petition for rehearing en banc are DENIED.